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No. 71-937

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILBERT HOLMES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 452 F. 2d 249.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1971. A petition for rehearing was denied on December 1, 1971. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 15, 1972, but the petition was not filed until January 17, 1972, and is therefore out of time under Rule 22 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient for petitioner's indictment and conviction.

2. Whether petitioner was prejudiced in preparing his defense by the government's bills of particulars.

3. Whether the procedure used to identify petitioner was so suggestive as to deprive him of due process.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and six co-defendants were convicted of conspiracy to sell heroin in violation of 21 U.S.C. 174. Petitioner was sentenced to twenty years' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioner was charged solely with conspiracy.[1] The conspiracy encompassed a heroin transaction in which petitioner was identified as a participant by one Willard Evans (Tr. 130–132)[2] who was originally named

[1] Six co-defendants were charged and convicted of substantive narcotics violations based on four heroin transactions on the South Side of Chicago. The first three transactions were heroin purchases from defendant Earl Matthews, which were negotiated and consummated by an informer, Hudson Bonner. The fourth transaction, witnessed by twelve government agents, was an attempted partial distribution of 8,000 grams of heroin by defendants Matthews and Pearman to defendants Stephens, Oliver and Westbrook (D. 2).

[2] "Tr." refers to the forty-six volume trial transcript filed with the Clerk of this Court. "D." refers to the two volumes of original documents on file with the Clerk of this Court.

as a defendant and whose case was severed before trial (Tr. 507).[3] Evans testified that he received a package of heroin from defendant Matthews near 75th and Stewart Streets, Chicago, about 9:00 p.m. in early November 1966 (Tr. 115). He testified that the heroin had been handed to Matthews by a passenger in a white Plymouth station wagon (Tr. 131). Although the driver looked familiar, Evans did not then recognize either the driver or passenger of the Plymouth (Tr. 433).

An April 10, 1967, Evans told agents of the Bureau of Narcotics and Dangerous Drugs that he believed he could identify the occupants if he saw them again (Tr. 524, 660). Sometime later the agents showed Evans a number of photographs (Tr. 665–666). Evans testified on voir dire that, when he was shown a photograph of petitioner, he could not make a positive identification but he told the agents that petitioner looked like one of the occupants (Tr. 666, 670). The photograph was not clear, but petitioner's name was on it (Tr. 789, 796–798). Evans had not met petitioner previously, but he had heard of him and had twice seen him at a distance before November 1966 (Tr. 431–432, 668). On April 20, 1967, Evans testified before a grand jury and apparently stated that he did not know who the occupants of the station wagon were.[4]

[3] Evans began cooperating with the government in April 1967.

[4] In April 1967 the grand jury indicted five of the defendants. A superseding indictment, naming all the defendants, was returned in October 1967. Evans was cross-examined about his testimony before the grand jury in April 1967 (see Tr. 694), but the grand jury transcript itself is not part of the record.

On May 15, 1967, while riding with federal agents in the vicinity of 81st and Champlain Avenue, Chicago, Evans recognized the Plymouth station wagon he had seen in November 1966 (Tr. 132, 791). The car was parked in front of petitioner's residence and was subsequently proven to be his property. The agents had not pointed out the car to Evans nor did they tell him why they were driving him through the South Side area of Chicago (Tr. 290–291). At the time Evans did not know that petitioner lived in the vicinity (Tr. 792).

On October 18, 1967, when the superseding grand jury indictment was returned, Evans and his co-defendants were arrested and placed in the same cell block. Evans recognized petitioner as the driver of the Plymouth station wagon and defendant Stephens as the passenger who handed the package of heroin to defendant Matthews in November 1966 (Tr. 434, 792–795). Petitioner's address book, taken at the time of his arrest, contained addresses and telephone numbers of six co-defendants. Three of these telephone numbers were unlisted (Tr. 3320, 4500). Three of the five defendants, whose arrests on March 5, 1967, led to the original indictment, had petitioner's unpublished telephone number in their possession (Pet. App. 4).

ARGUMENT

1. Petitioner concedes the existence of a massive narcotics conspiracy among many of his co-defendants (Pet. 7), but argues that evidence of his participation in the conspiracy was insufficient to support his

indictment or conviction. When petitioner was indicted in October 1967, defendant Evans had already informed federal agents that petitioner's station wagon definitely was the car from which a passenger handed a package of heroin to defendant Matthews in November 1966 and that petitioner resembled one of the station wagon's occupants (Tr. 132, 666, 670, 791). Moreover, petitioner's unpublished telephone number was found on three of the five defendants arrested on March 5, 1967 (Pet. App. 4). Evans did not appear before the October 1967 grand jury, which indicted petitioner, but narcotics agent Pringle, to whom Evans had confided, did appear (Tr. 5108–5109) and presumably informed the grand jury of Evans' statements. Such evidence was sufficient for the grand jury to find probable cause to indict petitioner.

At trial petitioner was positively identified by Evans as the driver of the car from which heroin was passed to Matthews in November 1966 (Tr. 126, 132). This identification, together with the circumstances of petitioner's possession of unpublished telephone numbers of three conspirators and the possession by three conspirators of his unpublished number, supports the inference that petitioner was a knowing participant in the conspiracy when he drove his station wagon to 75th and Stewart Streets in November 1966.

2. At trial petitioner unsuccessfully moved to suppress Evans' testimony regarding the November 1966 transaction on the ground that the government's bill of particulars did not identify petitioner as a participant in that transaction (Tr. 47). Of petitioner's

motion for a bill of particulars, which was made on November 27, 1967 (D. 49), only the following was allowed by the court (D. 89):

> 1. The location of the meetings with defendants Evans and Matthews and the purpose of such meetings, the meetings being set forth in overt Act 1 in Count 1.
>
> 6. Just what act or acts defendants Wilbert Holmes, Jessie Hoskins and Freddie Childress are claimed by the Government to have done or performed such that they became members of a conspiracy, as alleged in Count 1 of the indictment. As to this matter, movant cannot reasonably prepare his defense on the conspiracy charge without some information concerning defendants who are not alleged to have personally done or performed any act.

The government answered this motion on March 1, 1968, in the following manner (D. 103):

> 1. Count 4—In the N.D. of Ill., Chicago, Ill., and in Chicago, Ill., South of Madison Street (79th and Emerald, 67th and Normal and *75th and Stewart* and at other places unknown to the Government at this time). [Emphasis added.]
>
> 6. Count 1—they had a meeting.

The court of appeals stated that petitioner "correctly criticizes the Government's responses as incomplete" because they did not expressly identify petitioner and Stephens at the meeting in November

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[1] This motion was allowed only as to the location of such meetings (D. 89). Overt Act 1 stated: "During the months commencing in August 1966 and continuing to and through the month of March 1967, the defendant Willard Evans had meetings with the defendant Earl Matthews" (D. 2).

1966[*] but pointed out that other responses fairly apprised the defendants that the transaction at 75th and Stewart would be a part of the government's case (Pet. App. 43–44). Petitioner's participation in the November 1966 meeting was revealed in the prosecutor's opening statement on October 23, 1968 (Tr. 5), and the trial did not conclude until December 16, 1968. Thus as the court of appeals observed, petitioner had ample time to assemble such rebuttal evidence as he might have. Assuming that petitioner was surprised by the prosecutor's reference to the November 1966 heroin transaction, a request for adjournment was appropriate rather than a motion to suppress Evans' testimony. See *United States* v. *Glaze*, 313 F. 2d 757, 760 (C.A. 2). In view of the interval between the disclosure at the opening of trial and the conclusion of the trial, any variance between proof at trial and the bills of particulars is not grounds for reversal. See *United States* v. *Haskins*, 345 F. 2d 111 (C.A. 6); *United States* v. *Glaze*, *supra*, at 759.

3. Petitioner's contention that pre-indictment identification procedures were unnecessarily suggestive is not supported by the record. Narcotics agents showed photographs to Evans in an attempt to ascertain the

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[*] The government was apparently concerned that specific detail as to the meeting of four people would reveal the identity of its witness Evans. Defendants were indicted on October 18, 1967. On November 13, 1967, Martinez was shot in the head by an unknown assailant (D. 6; Pet. App. 39). On November 17, 1967, defendant Pearman's motion to sever defendant Evans' case on the ground that he was a government informer, having previously cooperated with the prosecution in a 1962 narcotics case, was denied (D. 9; Pet. App. 25). Evans' wife had previously received telephone threats (Tr. 507).

occupants of the station wagon, not to corroborate a preconceived theory (See Tr. 665–666). Moreover, positive identification of petitioner was not made when Evans was shown photographs in April 1967, but only when Evans saw petitioner in person in October 1967. Nor was Evans' identification of petitioner's station wagon the product of police suggestion. The station wagon was parked in front of petitioner's home, but Evans did not know where petitioner lived and the agents had not pointed out the station wagon to him.

Petitioner apparently also challenges the fairness of the post-indictment identification of petitioner by Evans when both were arrested and, petitioner states, placed in the same cell (Pet. 24–25). However, petitioner and Evans were placed in the same lockup, not the same cell (Tr. 434, 665, 792–795). They were placed there, not as a subterfuge for a lineup, but because Evans, like the other arrestees, had been named as a co-defendant in the same indictment, and the government was not then prepared to make known his status as an informer.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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